No. 2616

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STIMSON MILL COMPANY, a corporation, Claimant of the Tow Boat "Tillicum," her Engines, Boilers, Tackle, Apparel and Furniture, Appellant,

vs.

THE INLAND NAVIGATION COMPANY, a corporation, Claimant of the Steamer "Rosalie," her Tackle, Apparel and Furniture, Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF AND ARGUMENT OF APPELLEE

IRA BRONSON,
J. S. ROBINSON,
H. B. JONES,
Proctors for Appellee.

614 Colman Building,
Seattle, Washington.

Press of Pliny L. Allen, Seattle, Washington

No. 2616

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STIMSON MILL COMPANY, a corporation, Claimant of the Tow Boat "Tillicum," her Engines, Boilers, Tackle, Apparel and Furniture, Appellant,

vs.

THE INLAND NAVIGATION COMPANY, a corporation, Claimant of the Steamer "Rosalie," her Tackle, Apparel and Furniture, Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF AND ARGUMENT OF APPELLEE

IRA BRONSON,
J. S. ROBINSON,
H. B. JONES,
Proctors for Appellee.

614 Colman Building,
Seattle, Washington.

No. 2616

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STIMSON MILL COMPANY, a corporation, Claimant of the Tow Boat "Tillicum," her Engines, Boilers, Tackle, Apparel and Furniture, Appellant,

vs.

THE INLAND NAVIGATION COMPANY, a corporation, Claimant of the Steamer "Rosalie," her Tackle, Apparel and Furniture, Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF AND ARGUMENT OF APPELLEE

INTRODUCTORY.

The learned proctors for the appellant have devoted the major portion of their brief to a vehement but labored attack upon the conduct of

the "Rosalie." Much of this argument is so strained and unsound that it invites a reply. For example, a calculation is made upon page sixteen which it is alleged shows that the collision was caused by the momentum of the "Rosalie." It is absurd, of course, to attempt to calculate the momentum of a moving body without knowing its speed, and no one can say with any certainty whether or not the Rosalie had any movement at all. But this is by no means the most ridiculous feature of the calculation. It begins with the premise that the weight of the barge and her cars could not have exceeded twenty or twenty-five tons. (Brief 16). The barge was admittedly one hundred feet by twenty-eight and the cars were loaded with oil. (Par. I and II, Cross-Libel Ap. 9). Either car of course weighed more than twenty-five tons, a car float 100x28, must be fairly heavy, and then too it was lashed to a tug of 116 tons, and the whole mass moved as a unit.

But we cannot be diverted from the real issues on this appeal to answer this argument on the question of the "Rosalie's" fault, unsound as that argument is. As is invariably the case in head-on collisions, the crew of each boat declares their own vessel was at a standstill or had sternway and that the other vessel was coming ahead. We believe that the evidence for the "Rosalie" preponderated on this point. The Court, however, felt that the conflict was such that he was required, as judges often are in such cases, to harmonize the evidence,

and he did so by finding that both vessels were moving vessels. Though not agreeing with the trial court's decision as regards the "Rosalie" we recognize that it is supported by some evidence, and believing therefore that it would not be disturbed by the appellate court, we have not cross-appealed. But we do challenge the statement that the Rosalie was guilty of fault. The position of appellant that she was guilty of such grievous faults as to excuse those of its own vessel is so unwarranted that we pass it by without argument. If by the vehement claims of proctor this court is induced to believe that this issue is pertinent in this appeal, the record is before the court and speaks for itself.

The only questions before this court are whether the trial court rightly found the "Tillicum" chargeable with fault and whether it made a correct finding as to damages.

In discussing the first question we will not refer to any testimony other than that given by the appellant's own witness.

THE TILLICUM HAD NO LOOKOUT.

The collision took place in a thick fog in Seattle harbor. The "Tillicum" was proceeding through this fog with a scow one hundred feet long and twenty-eight feet wide lashed to her port side. The barge was laden with two ordinary oil tank cars. The bow of the scow projected thirty feet beyond

the bow of the "Tillicum." (Captain Charlesworth, Ap. 84 and 89). It was twelve feet from the bow of the tug to the pilot house. (Ap. 82, 89). The following testimony of Captain Charlesworth, Master of the "Tillicum" shows that his tug had no lookout.

> "Q. Who was on the lookout with you?
> A. I was the only one on lookout.
>
> Q. Where were you?
> A. In the pilot house.
>
> Q. Who else was in the pilot house?
> A. The mate.
>
> Q. Was he on duty in the pilot house also?
> A. Yes sir." (Ap. 85).

The mate was handling the wheel (Ap. 93) and he and the captain were the only men on deck. (Ap. 88). We submit the following authorities.

> "Two objections are made to the master as lookout, even admitting that he was on deck, and they are both well taken. Admission of the appellant is that the master was the officer of the deck, and that he had charge of navigating the vessel; and the proofs are satisfactory that if he was on deck at that time at all, he was in the wheel house with the man at the wheel. Steamers are required to have constant and vigilant lookouts stationed in proper places on the vessel, and charged with the duty for which lookouts are required, and they must be actually employed in performance of the duty to which they are assigned. They must be persons of suitable experience properly stationed on the vessel, and actually and vigilantly employed in the performance of that duty. Proper lookouts are competent persons other than the

master and helmsman, properly stationed for that purpose on the forward part of the vessel; and the pilot house in the night time, especially if it is very dark, and the view is obstructed, is not the proper place."

The Ottawa, 3 Wall 269; 18 L. ed. 165 at 167.

The above is a leading case on this point, and, as shown by Rose's notes and Supplement thereto, has been cited and followed dozens of times.

"The doctrine is well settled that the lookout required by the rules must not only be competent, but charged with no other duty while so serving and that the officer navigating the steamer cannot at the same time serve as lookout."

The J. C. Ames, 121 Fed. 918.

"There are indications too that the Alma was not keeping a proper lookout, she had no lookout other than the master. Although he was on the roof of this boat sitting by the bell, he did not observe the lights, on the Echo or the whistles blown by her, or, indeed, know that she and her tow were approaching, until the searchlight was turned upon them by the pilot of the Alma. It is the duty of every steamer navigating the thoroughfares of commerce to have a trustworthy lookout besides the helmsman * * * When acting as an officer of the deck and having charge of the navigation, the master of a steamer is not a proper lookout. Proper lookouts are persons other than officers of the deck or the helmsman."

The Echo, 131 Fed. 630.

"The lookout should be charged with no other duty than that to which he is assigned, and in that duty he should be actually vigilant and

continuously employed without having his attention distracted by any other service."

City of Phila. v. Gavingnan, 62 Fed. at 619.

"It also appears from the proof that, after the light of the Myrtle had been seen on board the Lookout, her captain allowed his wheelsman to go below to get lunch, while the lookout was sent aft to take the wheel, and, as the full watch consisted of only the captain and two men, this left the captain to perform the double duty of officer of the deck and lookout, which, with another vessel approaching, and in close proximity, was in itself an act of negligence, as it left his vessel practically without a lookout. *The Ottowa,* 3 Wall 268; *The Hypodame,* 6 Wall 216. Had there been a vigilant and competent lookout on libellant's vessel, charged with no other duty, it is probable that the captain would have been kept constantly advised of the situation of the Myrtle as the vessels neared each other, and the collision averted. While embarrassed by the double duty he had assumed, the captain of the Lookout committed the fatal error of going to port when he should have gone to starboard."

Larsen v. The Myrtle, 44 Fed. 779 at 781.

See also the following cases in which the *"Ottawa"* is cited and followed:

The Hypodame, 6 Wall 224; 18 L. ed. 796;

The Cambridge, F. C. No. 2334;

The Ancon, F. C. No. 348;

The Ant, 10 Fed. 297;

The Excelsior, 12 Fed. 200;

The Golden Grove, 13 Fed. 691;

McCabe v. Old Dominion S. S. Co., 31 Fed. 240;

The Manhasset, 34 Fed. 419;
The St. Nicholas, 49 Fed. 679;
The Geo. W. Childs, 67 Fed. 271;
The Livingstone, 87 Fed. 777;
The Lansdowne, 105 Fed. 441;
The Dauntless, 129 Fed. 722;
The Tarpon, 132 Fed. 278;
The Sitka, 132 Fed. 864;
Bingham v. Luckenbach, 140 Fed. 326.

Accordingly it appears from the evidence in the case, that within the meaning of the law, the "Tillicum" had no lookout whatever. This is one of the most grievous infractions of the rules that can occur. This court, speaking by Morrow, C. J., in a case decided in 1901, said:

> "The importance of the lookout and the high degree of vigilance required of the person occupying that position on a vessel, is clearly stated by the United States Supreme Court in *The Ariadne,* 13 Wall. 475, 478, 20 L. ed. 542, 543, as follows:
>
> 'The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel, with all the property and the lives of all on board. The same consequence may ensue to the vessel with which his shall collide. In the performance of this duty the law requires indefatigable care and sleepless vigilance. * * * It is the duty of all courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the per-

formance of the duty, and the effect of nonperformance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.'

"No deviation from this statement has been made by the Supreme Court in later cases (*The Oregon,* 158 U. S. 186, 193, 15 Supt. Ct. 804, 39 L. ed. 943), and it is therefore as binding today as when first made."

Wilders S. S. Co. v. Low, 112 Fed. at 172.

LOOKOUT NOT PROPERLY STATIONED.

If against this overwhelming and unanimous array of authority it can still be maintained that Captain Charlesworth was a proper lookout he was not properly stationed. We here confine our citations entirely to tug cases. In a collision occurring in New York harbor the court said:

"The tug had no lookout and the question is whether she has sufficiently excused herself for the omission. In the proper exercise of his duties the lookout should have been located about fifteen feet ahead of the pilot house, where the pilot was stationed while navigating the vessel. The lookout would have had a somewhat better view ahead than the pilot and should have been exclusively engaged in watching."

Erie R. Co. v. Oceanic Steam Nav. Co., 121 Fed. 440.

"But in view of all the evidence in the case, although the question must be admitted to be a close one, I am of the opinion that if the tug had had a proper lookout attending to his duty

> he would have seen the launch. There was no lookout forward. The officers claimed that the wind was so heavy that morning that spray constantly dashed over the stem of the tug and that the pilot house was a better place for a lookout than the bow. I do not think so, a little spray may have occasionally broken over the bow, but I do not think it was heavy enough or constant enough to justify the tug in not having a lookout forward. There was a man in the pilot house with the captain."
>
> *Cook v. Moran Towing & Transportation Co.,* 188 Fed. 846.

> "It appears that when the pilot of the Cheney did see the Palmer, he starboarded, and did in fact carry his vessel somewhat to port, but to what extent does not appear. But he was thirty feet aft of the bow occupied with his wheel. He was not a proper lookout, nor suitably located. * * * If tugs will go about the harbor without lookouts, they may not expect that the Court will conjecture nicely what would have happened if a lookout had been in his place, doing his duty when a collision occurred."
>
> *The Arthur M. Palmer,* 115 Fed. 417.

In fact under the circumstances a lookout on the bow of the "Tillicum" would scarcely have been sufficient. She was proceeding in a heavy fog, in frequented waters with a barge loaded with oil tanks projecting thirty feet ahead of her bow and more than forty feet ahead of her pilot house. (See cross-libel, par. II, and Captain Charlesworth's testimony, Ap. 82 and 89).

> "I think the Skidmore is further to blame for not having lookouts on the bows of the two barges alongside, which ran ahead of her some

thirty feet, that is from 45 to 50 feet ahead of the pilot house."

The A. P. Skidmore, 108 Fed. 972.

For similar cases see:

The Lyndhurst, 92 Fed. 681;

The Elk, 95 Fed. 846;

The Transfer No. 25, 211 Fed. 965.

REPLY TO APPELLANT'S ARGUMENT ON LOOKOUT QUESTION.

(a) Authorities cited.

Against the above array of authority the appellant cites six cases in its brief on page twenty. They deserve a brief examination.

The first case is *The Ping-on v. Blethen,* 11 Fed. 607. The tug Fokelin had the brig Condor made fast to her port side. On the poop deck of the Condor "were three experienced mariners", her master, the master of the tug and a pilot keeping a vigilant lookout. The Court held that such lookout was sufficient for the tug and tow.

The second case is *McFarland et al v. Selby Smelting & Lead Company,* 17 Fed. 253. A small stern wheeler called the Pilot was backing out of a slip at 2:00 p. m. in "open daylight." She got into a collision with the Bullion who charged her with

not having a lookout on the stern of her hurricane deck. The Court found that she had a lookout on her promenade deck; that he noticed the Bullion as soon as a lookout on the hurricane deck would have done, that he at once notified the captain of the Pilot, and that the complaint came with bad grace from the Bullion since "she herself had not a lookout stationed forward."

The third case is the *Pocomoke,* 150 Fed. 193. This case holds that a 61-foot government launch navigating in broad daylight, at nine in the morning, in good weather, with her master in the pilot house, well forward with all its windows open, and a deckhand forward of the pilot house whose especial duty was that of a lookout when the weather happened to be foggy, was not at fault for not having a proper lookout.

The fourth case is *The Caro,* 23 Fed. 735. In this case a collision happened between a tug and a schooner on a dark, but not a foggy night. Her lookout was in the pilot house with the helmsman. Says the Court:

> "A lookout stationed on the deck between the pilot house and the stern would have been in danger of being swept off by the sea. Under the circumstances it was not negligence to station the lookout in the pilot house of the tug."

(This case of course impliedly recognizes that the proper place for a lookout is outside the pilot house).

The remaining two cases cited from Benedict, not being available to us, we are unable to say whether or not they are as hopelessly inapplicable to the case at bar as the first four.

(b) Custom, and Rule 38.

It will be seen upon examination of appellant's brief and more clearly by an examination of the record that it is contended that there is a custom here on Puget Sound which excuses a lookout on tugs. It appears from the testimony that there is such a custom (Ap. 178). This of course is irrelevant and immaterial. Vessel men cannot by custom change a rule provided to promote safety of life and property at sea.

> "The statement that it is not customary for tugs to maintain a more vigilant lookout than this tug had is immaterial. The law determines their duty in this respect and they cannot avoid it without becoming responsible for the consequences."
>
> *The George W. Childs,* 67 Fed. at 272.

And as Judge Hanford said in *The Marion:*

> "There is no exception to the rule requiring a lookout in favor of craft capable of committing injuries on account of size."
>
> *The Marion,* 56 Fed. 271.

This contention makes this case of great public importance because this custom appears to have had the approval of the local board of inspectors.

Captain R. A. Turner, the local inspector of

hulls and boilers, testified that the local board of steamboat inspectors regarded a master in the pilot house with the pilot as a sufficient lookout justifying this upon his construction of Rule 38 of the General Rules and Regulations prescribed by the Board of supervisory inspectors (Ap. 75-177).

This rule reads as follows:

> "All passengers and ferry steamers shall, in addition to the regular pilot on watch, have one of the crew also on watch *in or near the pilot house; and this rule applies to all steamers navigating in the nighttime.*" (R. S. Sec. 4405).

We respectfully submit despite the testimony of Captain Turner that this rule does not authorize a steam vessel navigating in the night time from dispensing with a bow lookout any more than a rule requiring a signalman to be in the cab with a railroad engineer would authorize the omission of a rear brakeman. It simply adds to the general law an additional precaution, that is, it requires at least two men to be in the pilot house at night.

This rule but shows all the more clearly that Captain Charlesworth was not a proper lookout. He was the extra man required in the pilot house.

The rule, of course, applies to Inland waters, rivers and harbors. Says the Court in ruling upon a collision occurring in the Hudson River two miles south of Yonkers on a dark but clear night:

> "So the steamer likewise had only the pilot and the captain in the pilot house and these have

been repeatedly held not to constitute a proper lookout."

The Excelsior, 12 Fed. at 200.

The rule begins "All passenger and ferry steamers." A ferry boat and a mud scow got into a collision in the inner harbor of Boston on a clear and starlit night. The ferry boat had a lookout in her pilot house. The ferry boat was held at fault by the Circuit Court of Appeals for not having a lookout on the main deck forward.

Eastern Dredging Co. v. Winnisimmet Co., 162 Fed. 860.

Plainly these courts were wrong if the construction of Rule 38 by the Local Inspector of Hulls and Boilers and by appellant's proctor is right. And so was Judge Butler who in the *George W. Childs,* 67 Fed. 271, held that a tug in collision on a clear night in the Delaware river was at fault, because her only lookout was stationed in the pilot house, and so was Judge Adams in his opinion in *Ere R. Co. v. Oceanic Steam Nav. Co.,* 121 Fed. 440.

But even if Rule 38 could bear the construction sought to be put upon it it would not affect the case at bar.

The closing words of the rule are, "and this rule applies to all steamers navigating in the night time," but it does not add, "and in fogs." The Tillicum was navigating on a *foggy night;* and the question whether she should have had a proper lookout under

such circumstances is the one in which we are directly interested. This court is seriously asked to hold that the navigation of the Tillicum up the water front of Seattle Harbor in a dense fog at night with no one on watch, save her master and pilot is specifically justified by Rule 38. Consider the far reaching consequences of such a decision, for the rule reads: "All passenger and ferry steamers." In the face of the accumulated decisions of a hundred years, in the face of the increasing tendency to more and more safeguard lives at sea, the Court is asked to render a decision, that says to a vessel owner; by positive statute you are permitted to send your vessel with a thousand sleeping passengers in her berths into Seattle Harbor, or any other American harbor, in a dense fog, at night, with no one on watch to guard them from death and disaster, save that vessel's master and pilot stationed in her pilot house.

On account of the fact that an erroneous view of the law concerning lookouts has prevailed in this locality, and in the minds of eminent counsel, and even in the minds of the Inspectors themselves, this question must have appeared to the trial judge to be of great public importance, as indeed it was. He not only shows it in the opinion rendered in this case, but in an opinion reported immediately after the opinion in this cause, in the *Wilbert F. Smith,* 210 Fed. at 981, he deals even more fully with the tug lookout question. We feel that he was so impressed with the public importance

of refuting this erroneous and dangerous view concerning lookouts that for that reason he neglected to notice certain other faults in the navigation of the "Tillicum" which were in themselves sufficient to have justified an award of damages against her in this case.

THE NAVIGATORS OF THE TILLICUM VIOLATED THE SPIRIT OF RULE SIXTEEN AND WERE GROSSLY CARELESS IN THE PRESENCE OF KNOWN DANGER.

Here again we contend that the "Tillicum's fault is shown by the testimony of her master and mate, the only persons on her deck.

Captain Charlesworth

Q. What happened then Captain?
A. We really got an echo dead ahead.
* * *
Q. What echo did you get ahead of you?
A. Some floating object.
Q. An echo of what?
A. I judged a steamer.
* * *
Q. From some object ahead of you?
A. Yes.
Q. What did you take that to be?
A. A steamer. (Ap. 84)
* * *

Mate Anderson

Q. Well what was the first indication you got that morning that there was an object ahead of you in the water?
A. Well we got an echo pretty near dead ahead or approximately dead ahead—a faint echo.
Q. What was that an echo of?
A. That was from our whistle. (Ap. 95).
* * *

Q. What did you do as soon as you got the echo ahead of you?
A. Stopped her. (Ap. 84).

Q. Well after getting an echo from your fog whistle did you proceed until you gave another fog whistle? Did you give any other fog whistle?
A. Yes sir.

Q. In the mean time did you hear any fog whistle ahead of you?
A. No sir.

Q. About how long after the first fog whistle was it until you gave the second fog whistle, that is the first one from which you got the echo ahead?
A. Somewhere about a minute. (Ap. 85).

Q. What did you do, what was the first thing the captain did?
A. Slowed down sir.

Q. That is he gave a bell to the engineer?
A. Yes sir.

Q. To slow down?
A. Yes sir.

Q. Could you tell by the movement of the vessel that the engineer had slowed down?
A. Yes sir.

Q. Now tell what happened after that?
A. Well then after he slowed down we blowed the towing whistle again. (Ap. 95). * * *

Q. Did you see or hear anything before you gave your next fog whistle?
A. No sir. (Ap. 96).

Although Captain Charlesworth testified that after being notified of the presence of a vessel ahead by the echo that he stopped, the mate testifies four times that they only slowed down. A chain is no stronger than its weakest link and this testimony on the part of the mate should be taken most strong-

ly against the "Tillicum." Rule 16 provides that:

> "A steam vessel hearing apparently forward of her beam the fog signal of a vessel the position of which is not ascertained shall so far as the circumstances of the case admit, stop her engines and navigate with caution until the danger of collision is over."
>
> 30 Stat. L. 99.

Surely it will not be disputed that an echo of a whistle cannot be heard as far as a whistle especially when the echoing surface is a small dot on the water. This echo, as the captain and mate admit, informed them that a vessel was dead ahead. It of necessity also told them that it was not far away. The spirit of this rule if not the exact letter required them to stop their vessel instantly.

It will be noted by the Court that this case having been once submitted was reopened to permit the appellant to take further testimony in the lookout question. (Ap. 168). Appellant's proctor seized the opportunity to have the mate correct the above evidence but so persistent was the idea—for some reason—that the mate again testified that they slowed down. (Ap. 175).

But taking the more favorable evidence of the captain as true he was certainly guilty of grievous fault. Appellant's brief on page twelve makes this statement concerning Rosalie's master:

> "In that fog bank he knew there was a vessel in motion, whose position, course and intention he then had no means whatever of discovering.

> It was, therefore, his plain duty to give several short and rapid blasts of his whistle."

Captain Charlesworth may not have known that the vessel ahead of him was in motion but according to his own story he knew there was a steamer ahead of him in a fog so close that he got echoes from his own whistle, knew that she was inattentive to signals, had no possible means of knowing what she was, where she was or whither she was going and under such circumstances allowed his vessel to drift down upon her without blowing any alarm whistle, or even blowing an inquiry whistle of any kind for the space of a minute. (Ap. 84, 85). Surely no one can doubt that if this story is true the officers of the Tillicum were grossly negligent and must be so found under Art. 29.

> "Nothing in these rules shall exonerate any vessel, or the master or crew thereof from the consequences of any neglect* * * to keep a proper lookout or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."
>
> Inland Nav. Rules, 30 St. L. 102, 2 F. S. Ann. 181.

It is fortunate for us that this account is found in the testimony of the mate and master themselves and does not depend upon that of other witnesses for it seems almost incredible that navigating officers would permit their vessel to drift into known danger. Inattention is common enough but their deliberate carelessness on this occasion is rarely matched.

THE BURDEN WAS ON THE APPELLANT TO SHOW THAT THE FAULTS OF THE "TILLICUM" DID NOT CONTRIBUTE TO THE COLLISION.

The general rule in this subject is so well known that it needs no citation. A deficiency in maintaining a lookout will cast the burden in the offending vessel of proving that that fault did not contribute to the collision as in the case when positive statutory rules have been disobeyed.

> "While I believe it to be clear that a proper lookout would have discovered the sloop in time to keep off, it is not necessary that this fact shall affirmatively appear except as a result of the inference stated; it is sufficient that the contrary is not proved."
>
> *The George W. Childs,* 67 Fed. 271.

> "As it is impossible for the tug to show that a lookout properly stationed, and without other duties, would not have enabled the tug to have avoided the collision, she must be held in fault."
>
> *The Lyndhurst,* 92 Fed. 681.

> "Unless it should appear to the court that the accident could not possibly have been avoided, even if the lookout was in his place and doing his duty, the Cheny should be regarded as contributing to the accident. Under such a rule it is considered that the Cheny was culpably negligent. If tugs will go about the harbor without lookouts, they may not expect that the court will conjecture nicely what would have happened if a lookout had been in his place, doing his duty when a collision occurred."
>
> *The Arthur M. Palmer,* 115 Fed. 417.

Appellant did not meet this burden. It is true that a few tug captains testified that the pilot house was the best place for the lookout, and Inspector Turner was inclined to think so, but he says he never spent any time in a pilot house. (Ap. 177). But in any event this is a mere matter of opinion. Doubtless had we taken the time to do so we could have produced experienced men who would have given an exactly contrary opinion. The trial judge rightly disposed of these opinions in this language:

> "The further contention that a person could see and hear better from the pilot house because of its elevated position than from the bow of the vessel, I think, is answered by the testimony in this case, which shows that the fog was general. If the testimony should disclose that the fog bank lay near the water and that the pilot house extended above the fog, the contention might have some force." (Ap. 195).

The proctors for the appellant seem to think that the only reason for the lookout being required to be in the bow of the vessel is that he may see and hear better. But, as the cases show, an equally important reason is that he may be alone where there are neither companions or machinery or gear to distract his attention or prevent him from giving all his attention to the one duty of serving as eyes and ears to the ship.

There is a mass of evidence that the Rosalie was blowing her fog signals regularly. Not one was heard by the Tillicum. Her first intimation of the Rosalie's presence was a returning echo from

her own whistle. She first saw her about two hundred feet away. It was undisputed that the engines of both vessels were reversed when the collision occurred. The impact was slight (Mate Anderson, Ap. 97). The vessels just touched and separated as all the witnesses agree.

How can anyone say that a proper and attentive lookout on the Tillicum would not have heard the Rosalie's signals? How can anyone say that a lookout properly stationed in the bow of the scow, as many of the cited cases hold he should have been, or even on the bow of the tug, as they universally hold, would not have discovered the Rosalie in time to avoid the slight collision which occurred?

And who can doubt but that if the Tillicum had reversed when she became cognizant that a steamer was so close ahead of her in the fog that her own whistles were rebounding from her, that this collision would not have occurred? It would doubtless have been prevented had she blown danger signals, or indeed any other signals instead of remaining silent for a minute.

DAMAGES.

1. *Repair Bill.*

As appears from the testimony of Joshua Green, president of the libellant company, the stem of the "Rosalie" was stove in; and Captain James Fowler, Lloyds Agent, representing the Under-

writers, and Frank Walker, representing the owner, were called in to make a survey (Ap. 71). They agreed that certain repairs were necessary to replace the vessel in the same condition she was before the collision. (Ap. 71-74). Their report appears in the record as claimant's exhibit 7. (Ap. 183) The vessel was promptly sent to the Heffernan Dry Dock Company. This company did the work and rendered a bill in the sum of $3385.32, which was paid on July 25, 1911, by the libellant, after having received the approval of the surveyors. (Ap. 73, 79, 161). The bill and receipt appear in the record as libellant's Exhibit "B". (Ap. 185).

After the above evidence had been produced, the cross-libellant called one Sandstrom, a ship carpenter, an employee of the cross-libellant, but who had not seen the "Rosalie's" injuries, or the repairs made (Ap. 129), who testified that $850.00 would have been a fair price for the work called for by the survey, and made certain detailed criticisms of the bill, item by item.

Cross-libellant also called one Andrew McKay who had also done work for the cross-libellant, and who also had not seen the "Rosalie" after the accident, who testified substantially as Sandstrom had done. (Ap. 137). John L. Hubbard, manager of Hall Brothers Ship Yard, who likewise did not see the "Rosalie" after the collision, testified that the work could have been done for $1050.00 as a maximum (Ap. 144), and also made certain detailed criticisms of the bill.

In rebuttal we called David Hollywood, who was the foreman for the Heffernan Dry Dock Company at the time the vessel was repaired, who explained the bill item by item. (See testimony Ap. 149-160). We also called Frank Walker, who testified among other things that the bill was approved by himself, representing the libellant, and by James Fowler, representing the Insurance Company as being for "work necessitated by the collision;" and as "reasonable for the work done." (Ap. 160-166). His evidence also shows that the insurance was adjusted on the basis of the bill in evidence and explains many other matters.

It is undisputed that we paid out $3385.32 for repairs necessitated by the collision on a bill approved by the surveyors, one of whom was acting for the underwriters; and that the insurance was adjusted on that basis. The criticism of the bill came from witnesses interested in part, in part business rivals of the Heffernan Dock Company, but what is still more significant from men who did not see the injuries to the "Rosalie" or the repairs that were made. Furthermore their criticisms are explained by Hollywood and Walker. We have no doubt that the Court reading the evidence on this point (Ap. 149-166) must conclude that the sum of $3385.32 was a necessary disbursement on our part for repairs caused by the collision.

2. *Ship's Crew.*

Frank Walker did not testify that the new propeller was installed by the crew of the "Rosalie" but surmised that they might have since there was no mention of this work in the bill. (Ap. 165). He might have with equal reason surmised that the bill for that work being for matters not caused by the collision was separately rendered and separately paid. The item complained of is shown in detail in the apostles on page 185 and was justly included in the award.

3. *Damurrage.*

The only complaint here is that the claimant took advantage of the opportunity of the vessel's being laid up to install a new wheel which change would not otherwise have been made until her regular overhauling time. (Ap. 164). It was not in any way charged in the bill nor is there a single line of testimony to show that this operation extended the demurrage time. The criticisms on the award especially on the last two items are too captious to require further answer.

In conclusion we respectfully pray that the decree of the lower court be in all respects affirmed.

Respectfully submitted,

IRA BRONSON,
J. S. ROBINSON,
H. B. JONES,
Proctors for Appellee.